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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 609

LARRY GARA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 201-207) is reported at 178 F. 2d 38.

JURISDICTION

The judgment of the Court of Appeals was entered on November 28, 1949 (R. 201), and a petition for rehearing (R. 208-215) was denied on January 16, 1950 (R. 216). The petition for a writ of certiorari was filed on February 15, 1950. The jurisdiction of this Court is invoked under

28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

The questions presented are basically these:

1. Whether one "who knowingly counsels * * * another to refuse or evade registration" under the Selective Service Act of 1948 may be convicted of violating Section 12(a) thereof where the person so counseled had refused to register prior thereto and continued to refuse to register up to the date of the alleged counseling.

2. Whether Section 12(a) of the Selective Service Act of 1948, on its face or as applied in the instant case, is invalid under the First Amendment as an unwarranted restriction of the freedoms of speech and religion.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Selective Service Act of June 24, 1948, c. 625, Title I, 62 Stat. 604 (50 U. S. C. App., Supp. II, 451), are as follows:

> Sec. 3. Except as otherwise provided in this title, it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner,

as shall be determined by proclamation of the President and by rules and regulations prescribed thereunder.

* * * * *

Sec. 12. (a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, * * * or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title, or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title, or of said rules, regulations, or directions, * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years, or a fine of not more than $10,000, or by both such fine and imprisonment, * * *.

* * * * *

Sec. 611.6(d) of the Regulations issued under the Act, Ex. Order 9979, July 20, 1948, 13 F. R. 4177, provides:

> The duty of every person subject to registration to present himself for and submit to registration shall continue at all times, and

> if for any reason any such person is not registered on the day or one of the days fixed for his registration, he shall immediately present himself for and submit to registration before the local board in the area where he happens to be.

STATEMENT

The second count of an indictment filed on January 4, 1949, in the District Court for the Northern District of Ohio, charged that the twenty-seven-year old petitioner (R. 190), Dean of Men and professor at Bluffton [Mennonite] College and a Quaker (R. 118, 141-142), on or about November 8, 1948, knowingly counseled, aided and abetted one Charles Ray Rickert to refuse registration, as required by the Selective Service Act of 1948, in violation of Section 12(a) thereof (R. 2).[1]

The evidence adduced at the trial may be summarized as follows:

On September 10, 1948, the date on which he was required to register under the Act, Charles Ray Rickert, a Bluffton College divinity student and a conscientious objector to war and conscription, appeared before the local draft board, gave his name, address, and year of birth, but refused to

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[1] Count 1 of the indictment, which was dismissed prior to trial, charged petitioner with knowingly counseling, aiding and abetting other individuals whose names were unknown, between June 24, 1948, and November 8, 1948, to refuse or evade registration or service in the United States armed forces and to refuse to comply with the Selective Service Act (R. 2, 3, 177).

give the rest of the information necessary to register him under the Act. In an effort to change Rickert's mind, the board members talked to him, but to no avail. Rickert gave them a letter explaining that as a conscientious objector he refused to register and he did not register thereafter. (Gov. Ex. 1, R. 189; R. 20-27, 92, 97-98, 106-107, 111.) Several days after September 10, upon learning of Rickert's refusal to register and although he was not acquainted with him, petitioner sought Rickert out and, in his own words, "congratulated him and told him that I too would refuse to register; that I had refused to register in the last war; and that we were interested in his position" (R. 123). Subsequently, several times a week until November 8, 1948, the date on which petitioner was charged with counseling Rickert, he discussed the subject of non-registration and conscientious objections with Rickert and told him that he and his wife supported him, wanted to identify themselves with his cause, and wished him luck (R. 58, 101-102, 107, 108-109, 116, 123-126, 138-141, 142-145).

On November 8, 1948, officers who went to the college dormitory to arrest Rickert for refusing to register, met petitioner who, after ascertaining the purpose of their visit,[2] went to Rickert's room

[2] There is a conflict as to what petitioner said to the officers at that time. They testified that petitioner said, "you cannot take Rickert unless you take my wife and me. We are just as guilty as he for we told him not to register." Petitioner and

ahead of the officers (R. 28-29, 55, 61, 69-72, 126). The officers testified that petitioner told Rickert: "Stand by your principles. Do not let them coerce you into registering" (R. 29, 70-71). Rickert testified that petitioner's statement was, "do not let them coerce you into changing your mind" (R. 104, 110), and petitioner was uncertain whether he used the words "your conscience" or "your mind" (R. 127). Subsequently, Rickert was indicted, convicted upon a plea of guilty, and sentenced to imprisonment for 18 months for his refusal to register (Def. Ex. D and E, R. 197-198; R. 94-96, 106).

On November 8, 1948, the date of Rickert's arrest, petitioner wrote the following letter to the United States Attorney in Toledo (Gov. Ex. 8, R. 194-195):

> We have just learned of the arrest of Charles Rickert, a student at Bluffton College who, as a conscientious objector to war and conscription has refused to register for the draft. We have been very much concerned about the imprisonment of young war objectors. It especially concerns us since we would also refuse to register for the draft if we were asked to

---

his wife, who was also present, testified that petitioner said that he and his wife were just as guilty as Rickert because "they took the same position." Petitioner and the F.B.I. agents who interviewed him on November 15, 1948, testified that on that date petitioner denied that he stated on November 8 that he told Rickert not to register and that if he did make such a statement, he must have done it in the heat of excitement, because he did not become acquainted with Rickert until September 20. (R. 28-29, 31, 58-61, 70-71, 76-78, 113, 116, 126, 128.)

do so. We have openly urged young men to take this position and shall do all in our power to further the cause of civil disobedience to conscription in this country. If men like Charles are guilty then we, too, are guilty for we have advocated disobedience to the law and have supported men who take this position.

This imprisoning of young idealists, action apparently designed to break their spirits and force their submission to the demands of the government seems to us a terrible break with our American heritage of freedom. If one believes that war and conscription for war are crimes against humanity then he has a moral obligation to reject these practices and obey the moral law as he sees it. If the course that Charles and others like him have chosen is a criminal one, then we should also be prosecuted for committing a breach of law. However, we do not believe that this is a criminal act and feel that the government should reject the idea of punishment in these cases. If our government continues to punish men of conscience then we shall do everything in our power to identify ourselves with these men and tell every American citizen of the persecution for righteousness' sake that is taking place in our land.[3]

[3] Similar letters to the Attorney General and the United States Attorney in Chicago, dated September 30 and November 12, 1948, respectively, protesting against arrests of other young men who had refused to register were also admitted (Gov. Ex. 7, R. 192-193; Gov. Ex. 9, R. 195-196). All these letters were admitted only for the limited purpose of showing intent (R. 47, 166-167).

On November 15, 1948, petitioner made the following voluntary statements to F.B.I. agents who reduced them to writing (Gov. Ex. 2A and B, R. 190-191; R. 30-33, 43, 57-58, 74-81):[4]

> At 8 p.m. on or about August 25, 1948, I made a speech at a special meeting on Civil Disobedience held at the Friend's Meeting House located on North Sixth Street between Walnut and Washington Streets in Reading, Pennsylvania. This was an open meeting with people of all ages present. There appeared to be men present of legal draft age—ages 18 to 25, but I do not know the names and addresses of any of them.
>
> I made this speech for the specific purpose of aligning myself with those men who were refusing to register under the Selective Service Act of 1948. In this speech I advocated that men of draft age refuse to register under the Selective Service Act of 1948. In making this speech I intended to violate the Selective Service Act.
>
> On November 8, 1948, I told Charles Ray Rickert of Ropp Hall, Bluffton, Ohio, "Stand by your principles, don't let them coerce you into registering." I made the above statement in the presence of Special Agent Tootell and a Deputy Sheriff of Allen County. At the time I made the above statement I knew Rickert was of draft age and that he had already refused to register for Selective Service on September 10, 1948.

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[4] Petitioner did not sign this document because he did not like its "tone" and wanted "to think it over" (R. 129). He did not, however, deny that he made the statements.

> Following the passage of the Selective Service Act of 1948 I signed an open letter entitled, "A Call to American Christians of Draft Age" published by the Peacemakers of 2013 Fifth Ave., New York 35, N. Y. This open letter advocates refusal to register for the draft.[5]

Petitioner testified that as a Quaker he conscientiously feels that "wars are wrong, and that especially are wars wrong in our age, and really a form of race suicide" (R. 122); that a draft law is an immoral law that people such as he have an obligation to break (R. 133); that he expressed his feelings in this respect in an article he had written and in speeches he had made (R. 122); that he had made it a point to become acquainted with all non-registrants who are conscientiously opposed to conscription, and to support and identify himself with each such person, if he felt that such person was "inwardly prepared" to assume the responsibilities of his cause (R. 137); and that he supported Rickert and would do "any moral thing to encourage him" in his determination to oppose the draft law because he felt that Rickert was "inwardly prepared" (R. 138-145). He also testified that he had identified himself with the Peacemakers, an informal movement among many people, notably Christian ministers, who were opposed to

[5] The first, second, and fourth paragraphs quoted above were admitted only as bearing on petitioner's intent (R. 44-46, 166-167).

war and that he had signed the following pledge (Gov. Ex. 3, R. 192; R. 63-65, 122):

> PEACEMAKERS, Mt. Morris House
> 2013 Fifth Ave., New York 35, N. Y.
>
> I am in agreement with the Open Letter. I shall do what I can to spread its message. If a youth of draft age, I plan not to register or serve under the Draft; if not, I shall in every way possible assist and support Non-registrants.

The trial court instructed the jury in part as follows:

> * * * The real question is whether the words used were knowingly used in such circumstances and were of such a nature as that they would have a tendency to cause a refusal of duty as required by the Act. * * * [R. 167; see also R. 169.]
>
> * * * * *
>
> You are instructed that words which, ordinarily and in many places, would be within the freedom of speech protected by the First Amendment, may become subject to prohibition when of such a nature and used in such circumstances as to create a clear and present danger that they will bring about the substantive evils which Congress has a right to prevent.
>
> * * * * *
>
> * * * In its wisdom Congress has provided what is known as the Selective Service

Act of 1948, and in that Act it has specifically said that any person who knowingly counsels, aids or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title or of said rules, regulations or directions shall, upon conviction, be punished as thereinafter provided. This was and is a prerogative of the Congress, and the right of free speech does not extend to such a point as to permit an individual to knowingly violate the law and then excuse the violation by alleging a reliance upon the First Amendment to the Constitution which grants him the right of free speech. [R. 168.]

* * * * *

You are instructed that it is the law that although one is not punished in these United States for his religious views and beliefs, yet one may be punished when through external conduct these views are put into practice, if such practice is fraught with clear and present danger to the safety, morals, health or general welfare of the community, and is violative of laws enacted for their protection * * * [R. 169].

* * * * *

The defendant has testified that he was a member of a Society of Friends or Quakers, a religious sect, one of whose tenets is opposition to war and refusal to bear arms; and that he, because of his religious convictions conscientiously believed the Selective Service Law is immoral, unfair and unjust; and his counsel

has argued to you that the conduct of the defendant with which he is charged in this case was the result of his conscientious religious convictions, and for that reason he should not be found guilty as charged. You are instructed that such a belief, no matter how earnestly or conscientiously entertained, is not of itself a valid defense, excuse or justification for the violation of the law, if you find that the defendant did violate it, and that it should not be considered by you on the question of his guilt or innocence of the offense charged in the indictment. [R. 170-171.]

* * * * *

You are instructed that, under that Act and the Regulations which the President of the United States promulgated by Executive Order pursuant to the authority conferred upon him by law, it is the law that Rickert, having refused to register on September 10, 1948, which was the day prescribed for men of his age, had the continuing duty to register after that date and on November 8, 1948; and if you find under these instructions that the defendant on November 8, 1948, counseled, aided or abetted Rickert to evade or refuse registration or in continuing his refusal to register, and that the defendant did so knowingly, as charged in the indictment and proved to your satisfaction by the evidence in this case beyond a reasonable doubt, or if the natural and probable effect of what the defendant said to Rickert on November 8, 1948, under the circumstances there and then present, was of such a nature that it had

> a tendency to cause Rickert to continue his refusal to register under the Selective Service Act of 1948, whether or not it actually had that effect, you will find the defendant guilty as charged in the second count of the indictment. [R. 172.]

The jury found petitioner guilty (R. 180) and he was sentenced to eighteen months' imprisonment (R. 185). On appeal, the Court of Appeals affirmed the conviction (R. 207).

ARGUMENT

Petitioner does not challenge the sufficiency of the evidence to support his conviction under the trial court's instructions. His contentions are addressed principally to the constitutionality of the prohibition against counseling refusal or evasion of registration or service, on its face and as interpreted in the instructions, and to the validity of the regulation imposing a continuing duty to register.

1. Petitioner asserts that his counsel to Rickert on November 8, 1948, not to let himself be coerced into registering, did not constitute a violation of Section 12(a) of the Act on the dual grounds that Rickert's refusal to register, if any, occurred on September 10, approximately four weeks prior to the date of the counsel, and that Rickert had in fact complied with the requirements of the regulation (Pet. 5, 9-11, 17). In respect of the first ground, petitioner attempts to avoid the provision

of Section 611.6(d) of the Regulations that the duty to register "shall continue at all times" (*supra*, p. 3) by asserting that it is invalid because it "fixes a new crime (continuing refusal to submit to registration) and a new penalty (separate penalty for each day), contrary to" the "fundamental law that only Congress can create a crime and fix its punishment" (Pet. 11). Petitioner is clearly wrong. Section 3 of the Act imposes the duty: "* * * it shall be the duty of every male [person subject to its terms] * * * to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed thereunder." The regulation is a reasonable implementation of the duty so prescribed; it simply requires that a person who "for any reason" is not registered on a date fixed for his registration shall be under a continuing duty to register. The validity of an almost identical regulation under the 1940 act seems never to have been questioned. See *Fogel* v. *United States*, 162 F. 2d 54, 55 (C.A. 5), certiorari denied, 332 U. S. 791, where a conviction for failure to register was upheld against a claim that prosecution was barred by the statute of limitation solely on the basis that the offense was a continuing one. Neither does the regulation prescribe the penalty for the offense of refusing to register. Section 12(a) of the Act defines the

offenses and fixes the penalties. Although refusal to register is a continuing offense by virtue of the continuing duty imposed by the regulation, such refusal, contrary to petitioner's assertion, constitutes but one offense and not separate offenses each day the refusal continues. Accordingly, on November 8, 1948, Rickert was under a continuing duty to register. Petitioner's conduct in counseling Rickert to persist in his refusal was squarely within the prohibition of Section 12(a).

In support of his contention that Rickert had complied with the registration requirements of the regulations, petitioner relies on the recent decision of the Court of Appeals for the Second Circuit in *United States* v. *Norton*, decided January 19, 1950 (Pet. 9-10, 17). Petitioner has grossly misinterpreted that decision. The basis for the reversal of Norton's conviction was that there was no evidence that he refused to comply with the minimum requirements of the regulations, i.e., to appear before the board and to give it the information necessary to register him. Here, there is no lack of evidence, as there was in the *Norton* case, that Rickert refused to give the draft board the information it needed to register him. This contention, moreover, ignores the fact that subsequent to the date of petitioner's offense, Rickert was convicted on his plea of guilty of refusing to register (see p. 6, *supra*).

2. Petitioner's various arguments against the constitutionality of Section 12(a) as written and as applied here as an unwarranted abridgment of the rights of freedom of speech and religion present no new or novel questions. Substantially the same arguments were advanced in the Court of Appeals and, with greater elucidation than here, in the petition for a writ of certiorari in *Warren* v. *United States*, 177 F. 2d 596 (C.A. 10), certiorari denied, 338 U. S. 947, which involved a conviction of a conscientious objector to war for counseling his stepson not to register. The Court is respectfully referred to our brief in opposition in that case for our replies to these contentions.

Petitioner's complaint that the district court misapplied the "clear and present danger" test, even if otherwise meritorious (but see R. 205-206) would not be open to him here. For after the charge of which he now complains, petitioner's counsel made no such point as is now made, saying only (R. 175): "The court in a number of parts of its charge has referred to clear and present danger. We except to that because in this case there is no evidence of clear and present danger."

The only other contention here which was not presented in the *Warren* case is that the words of Section 12(a)—"counsels, aids, or abets another to refuse or evade registration"—do not satisfy the requirement of definiteness in a criminal statute. But the prohibition of the statute applies only to one who "knowingly"—i.e., intentionally and con-

sciously—counsels another to refuse to register, and there was ample evidence to show that petitioner knew he was violating the Act. Cf. *Screws* v. *United States,* 325 U. S. 91, 103-104. We think it is clear that this provision of Section 12(a), in terms which have a well understood meaning in the criminal law and are found in many statutes, does provide a reasonably definite and ascertainable standard of guilt.

CONCLUSION

The decision of the court below is correct, and there is no conflict. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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